SURETIES FOR HIRE AS AFFECTED BY MODERN SURETYSHIP LAW.—Of late years, in the application of suretyship law, there has been a marked tendency on the part of the courts to draw a sharp distinction between the liabilities to be imposed upon gratuitous sureties and sureties for hire. This distinction has been manifested by the adoption of numerous rules and doctrines, some affecting merely the construction of the obligation, others changing the measure of the liability, but all operating so as to deny to compensated sureties the favoritism which was formerly shown to all who bound themselves to answer for the acts or debts of another. None of them, however, are so stringent, so far reaching, or so revolutionary in principle, as that apparently formulated and sanctioned by the Supreme Court of Indiana in the recent case of *American Surety Co., of N. Y.* v. *Pangburn,* (Ind. 1914), 105 N. E. 769.

Appellant, a surety company, made a bond indemnifying appellee, a county treasurer, against loss by reason of the acts of his deputy. The bond was joint in form, showed in the body thereof the name of the deputy as principal and that of appellant as surety, and contained the express condition that the instrument should "not be construed as entered into or delivered by the surety until executed in due form by the principal." Appellant signed the bond and through an agent delivered it to appellee without its having been signed by the deputy. Until suit was brought, however, appellant was ignorant of the fact that the employee had not signed. The consideration for the bond was $50.00. From the evidence it appeared that in the two preceding years, appellant had issued to appellee two similar bonds, both lacking the employee's signature. On these facts, this court of last resort in Indiana came to the rather novel conclusion that the surety was liable in that it had delivered the bond with intention to be bound thereon, notwithstanding the express form and condition of the bond and the absence of its execution by the principal.

To justify this conclusion and the reasoning leading thereto, the two following propositions were relied on by the court:—

1. Although an ordinary accommodation surety is entitled to stand on the strict letter of his contract, a surety for hire cannot invoke this rule of strictissimi juris, and its rights are measured by the law applicable to insurance contracts.

2. A surety may be bound by an incomplete instrument which shows on its face a failure to execute by the principal.

An examination of the authorities of this country which have applied these theories under varying circumstances and with qualified assent, fails to disclose any substantial reason for their application to the instant case and the conclusion reached therein.

Generally speaking, the surety or guarantor has always been regarded as a favorite of the law and entitled to stand on the strict terms of his contract. BRANDT, SURETYSHIPS (3rd Edition) Vol. I. § 103 and cases cited. SPENCER, SURETYSHIPS, 120. He has been accorded this privilege because his undertaking was usually gratuitous and in the nature of an accommodation. With regard to commercial guarantors, however, this reasoning does

not apply because their obligations are usually based on full consideration and drawn up by them and in their interest. Consequently, the view has developed that sureties for hire should not be allowed to invoke the doctrine of strictissimi juris as accorded to gratuitous sureties, but that their obligations should be regarded as contracts of insurance to which they bear strong resemblance. Texas seems to be the only jurisdiction in the United States which consistently refuses to adopt this doctrine. *Lonergan* v. *San Antonio Loan Co.* 101 Tex. 63. But although the Supreme Court of Indiana may find this general authority to support its first proposition in the instant case as an abstract statement of a prevailing doctrine, still there seems very little justification for applying such a doctrine as a rule of collateral liability and giving to it such a force that the express terms of an unequivocal contract can be disregarded and a liability established merely according to the policy of the occasion. Although frequently invoked, this rule has never been regarded other than as one of construction, i. e., that obligations of compensated sureties shall be construed as contracts of insurance. And, following the practice in regard to insurance obligations, its operation has been so directed that if there be an ambiguity in the contract, it is usually resolved against the surety. 32 Cyc. 71-3; *Lawrence* v. *McCalmont*, 2 How. 426; *Lee* v. *Dick*, 10 Pet. 482; *Taussig* v. *Reid*, 145 Ill. 488; *Rindge* v. *Judson*, 24 N. Y. 64; *Title Guar. Co.* v. *Bank*, 89 Ark. 471; *American Surety Co.* v *Pauly*, 170 U. S. 133; *Ulster Savings Inst.* v. *Young*, 161 N. Y. 23. Justice Harlan, in *American Surety Co.* v. *Pauly*, 170 U. S. 133, seems to have pointed out the precise and only occasion for its application, that is, to allow a deviation from the exact words used only if "the bond is fairly and reasonably susceptible of two constructions." And to use the words of Chief Justice Fuller in *Guarantee Co. of N. A.* v. *Mechanics Savings Bank*, 183 U. S. 402, "this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements compliance with which is made a condition to liability thereon." Nor can it operate so as to extend, by implication, the liability of the surety beyond the terms of his contract. *Miller* v. *Stewart*, 9 Wheat, 680; *Ulster Savings Inst.* v. *Young*, 161 N. Y. 23. The Supreme Court of Indiana itself, in 1909 in the case of *Knight* v. *Castle*, 172 Ind. 97, 87 N. E. 976 adopted this same view and declared that "in construing the contract [of a surety company] it is not unreasonable to construe ambiguous language against the insurer, following the rules of insurance contracts, but having in mind also the rights, duties, liabilities, and functions which belong to the relation of suretyships, and stipulations fairly entered into either by compensated or gratuitous sureties."

Accepting this view, established by the general weight of American authority and recognized in previous Indiana cases, to the effect that this doctrine amounts only to a rule for the liberal construction of surety contracts, it seems apparent that the decision of the Indiana Court in the instant case can find no support in the fact that the surety was one for hire, such being the substance of the first proposition.

The question involved in the second proposition, i. e., whether a surety may be bound by an incomplete instrument which shows on its face a failure to execute by the principal, has been presented in a great variety of cases. A brief consideration of these may serve to throw some light on the validity of the conclusion reached in the instant case.

The most usual situation for the determination of this question occurs where the principal is named in the body of the bond as principal obligor but fails to sign, the signature of the surety alone appearing on the instrument. As to the liability of the surety in such a case the courts are apparently in conflict. A few hold that presumptively, the surety is liable. *Trustees of Schools* v. *Sheik,* 119 Ill. 579; *Ohio* v. *Bowman,* 10 Ohio, 445; *Goodyear Dental Co.* v. *Bacon,* 148 Mass. 542; *Parker* v. *Bradley,* 2 Hill, 584; *Douglas* v. *Bardon,* 79 Wis. 641. It must be noted, however, that in each of these cases, the obligation was either *joint and several* in form or the principal was bound by some external duty.

Opposed to this view are the great majority of courts which adopt the presumption that the surety signs only an condition that the principal sign also, and so is prima facie not bound unless the principal's signature appear on the contract. *Bean* v. *Parker,* 17 Mass. 591; *Johnson* v. *Kimball,* 39 Mich. 187; *Sacramento* v. *Dunlap,* 14 Cal. 421; *Wild Cat Branch* v. *Ball,* 45 Ind. 213; *Deering* v. *Moore,* 86 Me. 181; *Hall* v. *Parker,* 39 Mich. 287; *Novak* v. *Pittick,* 120 Ia. 286; *Martin* v. *Hornsly,* 55 Minn. 187; *School District* v. *Lapping,* 100 Minn. 139; *Ferry* v. *Burchard,* 21 Conn. 597; *U. S. Fid. Co.* v. *Haggart,* 163 Fed. 801; *People* v. *Carroll,* 151 Mich. 233; *Bunn* v. *Jetmore,* 70 Mo. 228; *People* v. *Hartley,* 21 Cal. 585; *Weir* v. *Meid,* 101 Cal. 125. In some of these cases, the position is taken that this presumption in favor of the surety may be rebutted by evidence that the surety waived the signature of the principal, but that such waiver must be explicitly and affirmatively proved. *Weir* v. *Mead; Novak* v. *Pittick; Bean* v. *Parker; Hall* v. *Parker; Martin* v. *Hornsly; Bunn* v. *Jetmore,* supra. In others, the exception is made that when the principal is bound to perform through an independent obligation, his execution of the bond is unnecessary. *Trustees of Schools* v. *Sheik,* 119 Ill. 579; *Ohio* v. *Bowman,* 10 Ohio 445; *Cockrill* v. *Davie,* 14 Mont. 131; *Bean* v. *Parker; Deering* v. *Moore; U. S. Fid. Co.* v. *Haggart; Bunn* v. *Jetmore,* supra.

A few authorities can be found which declare that if the principal is in no way bound, then the surety is conclusively free from liability. Although some of these take this view in regard to bonds both joint and several in form—*Martin* v. *Hornsly,* 55 Minn. 187; *Husak* v. *Clifford,* 179 Ind. 173, 100 N. E. 466; *Bunn* v. *Jetmore,* 70 Mo. 228; the greater number concern joint bonds only. *Sacramento* v. *Dunlap; Weir* v. *Mead; Novak* v. *Pittick; U. S.* v. *Boyd; School District* v. *Lapping; People* v. *Carroll; People* v. *Hartley,* supra.

This brief analysis shows that in practically every case in which the bond is joint only in form, the liability of the surety is denied unless the principal also be under some duty to perform. It is also clearly evident that in those instances in which the surety's liability may be established under

such conditions, that liability must be predicated by one of three features,—a bond *joint and several* in form and not joint only, an explicit waiver of the principal's signature by the surety, or an independent obligation binding the principal.

In the instant case, none of these features can be found. The bond on which the action is based is not joint and several but joint only; there is no explicit waiver by the surety; nor is there any evidence that the principal is bound by an independent obligation to indemnify the surety. Accordingly, even leaving out of consideration the express condition present in the instant case, the conclusion of the surety's liability reached therein seems to be unsupported by any apparent authority. On the contrary, since this action was based on a joint bond, some of the cases cited would relieve the surety.

Furthermore, if an examination be made of those cases in which the obligation, besides naming the principal in the body thereof, contains an express condition requiring the principal's signature as in the instant case, even stronger grounds are found for disagreeing with the conclusion reached by the Supreme Court of Indiana.

In *U. S. Fid. Co.* v. *Ridgly,* 70 Neb. 622, 97 N. W. 836, a bond was given for the guarantee of an employee's fidelity. It contained, as in the instant case, an express condition not to be valid unless signed by the employee. The latter failed to sign. The Supreme Court of Nebraska held that as this condition had not been complied with, the surety was not liable.

Similarly, in *Union Ins. Co.* v. *U. S. Fid. Co.,* 99 Md. 423, on facts almost identical with those in the instant case, the surety was held not to be bound because the condition expressly recited had not been complied with.

The Circuit Court of Appeals for the 6th Circuit, in *Blackmore* v. *Guar. Co. of N. A.* 71 Fed. 363, came to this same conclusion.

And strange as it may seem in view of the decision rendered in the instant case, this same position was taken in several Indiana cases, *Husak* v. *Clifford,* 179 Ind. 173, 100 N. E. 466; *Allen* v. *Mainey,* 65 Ind. 398, and *Knight* v. *Castle,* 172 Ind. 97, 87 N. E. 976. In the last preceding case the Supreme Court of Indiana declared that "the liability of a guarantor [in that instance a commercial surety] is a technical liability, a conditional liability; they are entitled at every opportunity to protect themselves, *but when they couple with it a specific condition,* we are not at liberty to disregard it." This case was decided in 1909, and it is hard to understand how the Indiana Court could come to an exactly contradictory conclusion within five years without in some way attempting to justify the change.

It is true that in support of the conclusion reached in the instant case, one case was cited, that of *General Ry. Signal Co.* v. *Title Guar. Co.,* 203 N. Y. 407, in which the surety was held liable, in the absence of the principal's signature, and although the bond was joint in form and contained an express condition requiring the principal to sign. But that case can have no application to the one in hand because the decision was expressly based on the fact that the principal was bound to the surety by an independent agreement, fully protecting the surety. As before stated, this feature is lack-

ing in the instant case. Moreover, this New York case, besides being in conflict with the views expressed in *Smith* v. *Molleson,* 148 N. Y. 241, seems to stand alone as any authority for the conclusion reached therein.

From this general survey of similar cases, it must be conceded that the application of the second proposition as made by the Supreme Court of Indiana, that a surety may be bound by an incomplete instrument which discloses a failure of the principal to sign, although the obligation is joint only, although an express condition requires the principal's signature, although the surety has not waived such condition, and although there is no external duty binding the principal, is without any direct support in precedent and, on the contrary, strongly opposed by practically all established authority.

Both propositions established in the instant case being insufficient to support the conclusion reached therein, the only possible ground on which the decision can be justified is to assume that the Indiana Supreme Court is inclined to place compensated sureties in that class of persons who are subjected to extraordinary liability. Whether such an assumption is correct remains to be seen in future cases. At present, however, it is, to say the least, an innovation in suretyship law. A. V. D.

JURISDICTION OVER NON-RESIDENTS IN GARNISHMENT PROCEEDINGS.—The Supreme Court of Wisconsin was confronted, in the recent case of *Thomas* v. *Citizens Nat'l Bank of Pokomoke City* (Wis. 1914) 147 N. W. 1005 with a perplexing question as to the power of a court over a non-resident garnishee owning a debt due in another state. A non-resident intervening claimant in garnishment proceedings was summoned as garnishee upon his appearance as claimant, and it was disclosed that the debt due from him to the principal defendant was an open banking account in another state; the court held that it had no jurisdiction to charge a non-resident, found temporarily within the state, as garnishee of another non-resident upon a debt due in another state, since the situs of the debt was not within the jurisdiction of the court.

The court does not mention the leading case of *Harris* v. *Balk,* 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann Cas. 1084, which established the doctrine that the temporary presence of a garnishee within the state gives a court of that state jurisdiction to render judgment against him in a garnishment proceeding upon personal service of process within the state, if, during such temporary presence within the state, the principal debtor could have sued him there to recover the debt, and if the laws of the state permit the garnishment of a debtor of the principal debtor. But the decision in the principal case may very well be reconciled with that of *Harris* v. *Balk* on the ground that although the court has the power to give a valid judgment against such a garnishee it is not bound to do so. On the facts also, the principal case is distinguishable from the leading case. It might well have been held that the garnishee was immune from service of process while in the state only for the purpose of becoming a party to judicial proceedings therein. *Cooper* v. *Wyman,* 122 N. C. 784; *Mitchell* v. *Huron,* 53 Mich. 541. An exhaustive brief on this subject is found in the notes to *Mullen* v. *Sanborn,* 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721-738.